SUPREME COURT, U. S.

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In the Supreme Court of the United States

October Term 1968

No. 1314

GARWIN CORPORATION, S'AGARO, INC., JOSEPH WINKELMAN and MILTON MIRSKY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioners, Garwin Corporation, et al., pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 28, 1969.

OPINION BELOW

The opinion of the Court below (Appendix A, infra, App. 1) is not yet reported. The Supplemental Decision and Order and Amended Order and the Order Correcting Supplemental Decision and Order are reported at 169 N.L.R.B. No. 154, 67 LRRM 1296 (Appendix C, C-1, infra, App. 4-App. 16)[1]

JURISDICTION

The Judgment of the Court of Appeals was entered on February 28, 1969 (Appendix A, infra, App. 2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented is whether the Board as a remedy for the unfair labor practices may properly order the employer to do either of the following:

(1) Supply the union with a list of the names and addresses of all employees and keep the list current for one year.

(2) Grant access to bulletin boards to the union for a one-year period.

(3) Permit union organizers to have unrestricted access during non-working time to plant parking lots for a period of one year.[2]

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[1]The Findings of Fact, Conclusions of Law and Order of the Board originally entered and enforced in part, denied in part, and remanded to the Board by the Court of Appeals for the District of Columbia, 374 F.2d 295 for further consideration because of defect(s) in the Remedy are reported at 153 N.L.R.B. 664.

[2]as required by the Supplemental Decision and Order and Amended Order, and specifically the Order Correcting Supplemental Decision and Order (Appendix C, infra, App. 4-App 6 and Appendix C-1, infra; see: paragraphs 2(f) (g) and (h) of Amended Order.)

STATUTE INVOLVED

The relevant provision (Section 10(c)) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) is set forth in Appendix B (infra, App. 3).

STATEMENT OF THE CASE

The National Labor Relations Board, in June of 1965, issued a Decision and Order finding that the Petitioners, Garwin Corporation, et al., had violated Sections 8(a)(1) (3) and (5) of the National Labor Relations Act, as amended, by closing the Garwin Corporation plant in Jamaica, Long Island, and moving the operation to Miami, Florida (153 N.L.R.B. 664). The remedy, in 153 N.L.R.B. 664, among other things, required the Petitioners herein, or better, the employer, **to bargain with the Union either at the New York plant, if it returned there, or at the new Florida location, irrespective of whether the Union had a majority status.** Thereafter the Board filed a petition with the United States Court of Appeals for the District of Columbia to enforce its order. **That Court** enforced the Board's order in other respects but **rejected the remedial requirement that Respondents recognize and bargain with the Union for the employees at the Florida location, irrespective of whether the Union had majority status.**[3] The Court, in that decision, remanded the record to the Board for further consideration of **this aspect of its remedy**; all parties to the litigation then filed in this Court petitions for writ of certiorari which were denied.[4]

[3] **Local 57, I.L.G.W.U. v. N.L.R.B.**, 374 F.2d 295; see **"The Board's Remedy,"** Syllabus 9.

[4] Petitions Nos. 1251, 1327 and 1257, October Term 1966.

After remand the Board entered its Supplemental Decision and Order and Amended Order (Appendix C and C-1, App. 7-App. 16) where it recited, among other things, the following:

> "Since the **possibility exists** that the employees at the Florida location will be influenced by the Respondent's unlawful conduct, appropriate remedies are available to insure that they have an opportunity to formulate their desires with regard to representation in an atmosphere free of the fears generated by their Employers' demonstrated propensity to violate the Act. To this end we shall apply various remedies invoked by the Board to offset the effects of massive unfair labor practices in other cases where issuance of a bargaining order was denied. First, we shall order the Respondents to furnish the International Ladies' Garment Workers' Union, upon request made within 1 year, with the names and addresses of all employees at its Florida plant and to keep that list current for a 1-year period. Second, we shall require that, upon request of the International Ladies' Garment Workers' Union made within 1 month of this Supplemental Decision, the Respondents shall immediately grant said Union and its representatives reasonable access to its bulletin boards and all places where notices are customarily posted for a period of 1 year. Third, we shall order the Respondents to permit employees to have access to union organizers on plant parking lots and plant approaches during non-working hours." (emphasis added)

which not only fashioned a new and harsh remedy, but, in effect, made new findings, though not so enunciated, in order to effect the new remedy . . . .all done of course without any new or additional testimony.

The Court, in the Opinion and Judgment sought to be reviewed, granted the enforcement of the Supplemental Decision and Order. The propriety of this is the issue[5] upon which the Petitioners seek a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Decision and Order of the District of Columbia Circuit enforcing 2(f) (Appendix p. 14) which reads as follows:

> "Upon request made within 1 year of the issuance of this Decision, immediately supply the International Ladies' Garment Workers' Union a list of the names and addresses of all employees at their Miami, Florida, plant, and keep that list current for a 1-year period."

is in direct conflict with the decision of the Second Circuit in **Textile Workers Union of America, v. N.L.R.B.** (C.A. 2, December 27, 1967) 388 F.2d 896, where the Court, speaking through Mr. Justice Joseph Smith, stated on page 905, Syllabus (11):

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[5]See paragraphs 2(f), (g) and (h) of Amended Order, and the Order Correcting Supplemental Decision and Order (Appendix p. 14)

> "(11) The final provision of the order requiring our attention is that which directs the Company to provide at the Union's request a list of the names and addresses of all of its employees in North and South Carolina. We do not think that this provision, * * * * is designed to effectuate the policies of the Act."

Likewise, the Decision and Order of the District of Columbia Circuit enforcing 2(g) (Appendix p. 14) which reads as follows:

> "Upon request, immediately grant the International Ladies' Garment Workers' Union and its representatives reasonable access, for a 1-year period, to plant bulletin boards and all places where notices to employees are customarily posted at the Miami, Florida, plant."

also appears to be in conflict with **J. P. Stevens & Co. v. N.L.R.B.** CA. 2, 380 F.2d 292 (1967) where the Second Circuit rejected the concept that reasonable access to bulletin boards in the plants be given for certain periods of time saying, in Syllabus (15) that the union had not achieved a majority status; as for the enforcement of the 2(h) provision (Appendix p. 14) which reads as follows:

> "Permit employees at the Florida plant to have unrestricted access to union organizers during non-working time on plant approaches and parking lots for a period of 1 year from the issuance date of this Decision, subject only to such reasonable and non-discriminatory regulations as

> Respondents may find it necessary to impose in the interest of plant efficiency and discipline, provided, however, that said regulations do not serve to thwart employees in the exercise of the right guaranteed them herein."[6]

the Board itself, in **J. P. Stevens & Co.**, 171 N.L.R.B. No. 163 (1968), 69 LRRM 1088, denied the union's request for access to parking lots saying that it did so for the reasons set forth in **J. P. Stevens III.** The obvious contentions between the Circuits is highlighted and enlarged by the confusion existing within the Board as indicated by its own decisions;[7] the confusion which exists as a result of the Board's so-called new approach in fashioning broader remedies is enormous; typical is the jungle jumble resulting from the **J. P. Stevens** cases . . . applicable herein and about which the Bureau of National Affairs, in its analysis of January 13, 1969 (70 Analysis 5), had this to say:

> "There have been five Stevens cases. Stevens I involved the first year of the union's organizational campaign. The NLRB handed down its decision in this case in 1966, finding that the company had engaged in 'massive' violations of the Act and had discriminatorily discharged 71 employees.

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[6]See Appendix, p. 14

[7]In its fifth J. P. Stevens decision The Board denied the Union's request for access to plant parking lots **(J. P. Stevens and Co.,** 69 LRRM 1088.)

"In view of the extensive violations, the Board decided that the case warranted a remedy going beyond the usual reinstatement, backpay and notice-posting order. It added the requirements that a copy of the notice be mailed to each employee, that a company official read the notice to employees, and that the union be given reasonable access to company bulletin boards for one year. These requirements applied to all the company's plants in the two states. (J. P. Stevens & Co., Inc. NLRB 1966, 61 LRRM 1437.)

"In its decision in the second Stevens case, the NLRB added the requirement that the company furnish the union a list of the names and addresses of all employees in its plants in the two states. (J. P. Stevens & Co., Inc., NLRB, 1967, 64 LRRM 1289.)

"The first two cases were taken to the U. S. Court of Appeals at New York. In the first case, the court went along with the notice-posting, and notice-mailing requirements of the order. But because of the 'element of humiliation' involved in the public-reading provision, the court modified the order to require that the order be read in plants in which unfair labor practices were found to have been committed and that the company be given the alternative of having a Board agent rather than a company official, read the notice. (J. P. Stevens & Co., Inc. v. NLRB, CA 2, 1967, 65 LRRM 2829.)

"The court also refused to enforce the part of the order in the first case that required that the union be given reasonable access to company bulletin boards; it stated that the Board did not establish the need for such a provision. The order, as thus modified, was denied review by the Supreme Court. (J. P. Stevens & Co., Inc. v. NLRB, U.S. Sup.Ct. 1967, 66 LRRM 2728.)

"When it reviewed Stevens II, the Second Circuit enforced the bulletin-board requirement, stressing that the requirement is limited by the word 'reasonable' before 'access.' **But it refused to enforce the names-and-addresses requirement.** (Textile Workers Union v. NLRB (J. P. Stevens & Co., Inc.), C.A. 2, 1967, 67 LRRM 2055.)

J. P. Stevens III and IV

"Stevens III involved alleged violations of the Act between April 16, 1965, and April 7, 1966; Stevens IV involved the alleged unlawful discharge of three employees in August 1966.

"In its orders in Stevens III and IV, the Board modified the public-reading requirement to provide the alternative set out in the modification made by the Second Circuit in the order in Stevens I. The names-and-addresses requirement was not included in the Stevens III order, but it was in the Stevens IV order. (J. P. Stevens & Co., Inc., NLRB 1967, 66 LRRM 1024; J. P. Stevens & Co., Inc., NLRB, 1967, 66 LRRM 1030.)

"The NLRB handed down its decision in Stevens V on June 12, 1968. The order was the same as in Stevens IV. (J. P. Stevens & Co., Inc., NLRB 1967, 69 LRRM 1088.)

SIGNIFICANCE: The problems encountered by the Board in the Stevens cases underline how difficult it is to get agreement when the Board fashions novel and broad remedies. The Board has wide discretion in drafting remedial orders that will effectuate the purposes of the Act, but the courts scrutinize closely any requirements that may be considered punitive, rather than remedial.

"In the 1966 Laney & Duke case, for example, the U. S. Court of Appeals at New Orleans deleted from an order a provision requiring the employer to read the Board's notice to all employees, calling the requirement "unnecessarily embarrassing and humiliating to management." (NLRB v. Laney & Duke Co., CA. 5, 1966, 63 LRRM 2552.) The U. S. Court of Appeals for the District of Columbia similarly refused to enforce a public-reading requirement, terming it "humiliating and degrading" to the employer. (IUE v. NLRB (Scott's, Inc.), CA DC, 1967, 66 LRRM 2081.)

"But in a case published this week, the Fifth Circuit upheld a notice-reading requirement in a case in which there was a justifiable presumption that as many as 44 or 45 of the 190 employees were illiterate. It distinguished the case from Laney & Duke, (NLRB v. Bush Hog, Inc., CA 5, 1968, 70 LRRM 2070.)

> "So there now is a conflict between the Second and Fourth and the Fifth and District of Columbia Circuits on the notice-reading requirement and between the Second and Fourth Circuits[8] on the names-and-addresses requirement in these remedial orders in what the Board refers to as 'massive' or 'flagrant' violation cases."

It is important to remark, at this point, that the Petitioners conduct in the case at bar is neither "massive" nor "flagrant" in the classical, or any other sense.[9]

As we have and shall see the direct conflict, and lack of uniformity, existing between circuits is only a part of the reason(s) why this Petition should be granted; this case is otherwise important. The remedies now being sought by the Board were hardly conceivable at the time of the enactment of Section 10(c) of the Act. The continuing future consequences of the remedies envisioned by the Board, and, indeed, those here, are troublesome and require an early and definitive ruling by this Court. In the instant case the remedies, in the light of the facts, are so erroneous as to deny due process to both the employer and its employees alike. Nor is there any question but Labor Organizations are concerned with the determinations necessary to be made.

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[8] *And now the District of Columbia Circuit.*

[9] See the Brief (and reasoning) of these Petitioners in Case #19,624 lately pending in the Court of Appeals for the District of Columbia Circuit to which this petition is directed; rather than restate by printed inclusion here, said brief, filed in October 1968 is made a part of this petition by reference as if fully set out herein; a certified copy has been forwarded to the Clerk of this Court as a part of the record.

even though it is doubtful if any bonanza will inure unto such organizations as likely envisioned should such remedies be given sustenance.[10]

Section 10(c) of the LMRA authorizes the Board to issue an order requiring the perpetrator of an unfair labor practice "to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement, with or without back pay, as will effectuate the policies of the Act."

As to the cease and desist part of the order, the courts have held that the conduct prohibited must be reasonably related to the violations found. In its early days, the Board, having found one or more unfair labor practices, customarily commanded the defendant to cease and desist from all violations. But it was brought up short by this Court in the case of **NLRB** v. **Express Publishing Co.** (1941) 312 U.S. 426, in which the Court said:

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger in the future is to be anticipated from the course of his conduct in the past. * * *

In cases, however, where an employer has shown persistent attempts by various methods to defeat self-organization, *unlike here*, the courts ordinarily permit a

[10]It is questionable whether the Board's Excelsior Rule, **Excelsior Underwear, Inc.**, 156 N.L.R.B. 1236, has benefited labor organizations, though increasing the work load of all those interested.

sweeping cease and desist order. Wider latitude is accorded to the Board in framing the affirmative part of its order. The test is whether the order will effectuate the policies of the Act. The Board is ordinarily made the judge of what effectuates these policies, but this Court drew this line: The Board's authority does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he has engaged in unfair labor practices, even though the Board may be of the opinion that the law's policies might be effectuated by such order. **(Consolidated Edison Co. of New York, Inc.** v. **NLRB** 1938, 59 S.Ct. 206, 305 U.S. 197.

In **N.L.R.B.** v. **Simplex Time Recorder Company,** 401 F.2d 1968 CA. 1, Syllabus 3, 4, pages 548, 549, the Court recited:

> "(3, 4) Whenever an order is not in terms restricted to the actions previously found two questions may arise: is the order too broad in substance, that is, specifying matters beyond the power of the Board to forbid; is it too broad in form, that is, not clear in what it proscribes. We did not question the substance of the prohibition in United Wire, and we do not now. Of course the fact that an employer has committed one violation of the Act does not empower the Board to enjoin any and all future violations of any character; the order must be limited to similar and therefore foreseeable misconduct. NLRB v. Express Pub. Co., 1941, 312 U.S. 426, 437, 61 S.Ct. 693, 85 L.Ed. 930.

There is nothing foreseeable in this cause that warrants enforcement of the three (3) items complained of to which this petition is addressed and so limited; there has been no suppression of any rights of the Florida employees. Without regard to the differences existing between the circuits and within the Board, these remedies, as are sought to be reviewed under the circumstances and facts of this cause, are not only arbitrary and punitive, but smack of a denial of due process, both as to the employer and its employees.

CONCLUSION

For the above stated reasons petitioners respectfully request this Court grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision and judgment herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petition for Writ of Certiorari were mailed to:

ARNOLD ORMAN, ESQUIRE
General Counsel
National Labor Relations Board
Washington, D. C.

HONORABLE ERWIN N. GRISWOLD
Solicitor General of the United States
Office of the Solicitor General
Washington, D. C.

this 24th day of April, 1969.

JOSEPH A. PERKINS